The Royal Bank of Scotland Bhd v Seng Huah Hua & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO 24NCC-416–12 OF 2011
HASNAH HASHIM J
23 JANUARY 2013

Contract — Mistake — Mistake of fact — Bank released funds to third party on mistake of fact based on forged documents — Whether recipient bound to return funds — Whether recipients of funds held sum as monies had and received to use of bank — Whether recipients unable to prove they gave valuable consideration for receipt of funds — Contracts Act 1950 s 73

The first to the fourth defendants ('the defendants') ran a firm named Syarikat Kear Seng Trading ('Kear Seng') in Tawau, Sabah and from the same business premises they also operated a money-changing business named Insa. Kear Seng maintained an account with the fifth defendant bank ('PBB'). According to the testimony in the suit, the first defendant ('D1') received a telephone call from a man named 'John' enquiring whether he could obtain USD120,000 in exchange currency from Insa. D1 told 'John' that Kear Seng had USD100,000 available for exchange and if this was acceptable to 'John' he was to bank in the equivalent sum of RM308,000 into Kear Seng's account with PBB. Following the banking in of that sum a woman allegedly named Kueh Siok Hang ('Kueh') came to Insa's premises to collect the USD100,000. The RM308,000 came into Kear Seng's account on the plaintiff's instructions after it was requested to facilitate the transfer of that sum by a person named 'Ng' who claimed to represent one of the plaintiff's corporate customers, Supermax. Ng had produced a letter of authorisation from Supermax, permitting him to deal with the plaintiff, and a manual payment order purportedly signed by an authorised Supermax signatory. After confirming that the signature on the payment order matched its records, the plaintiff instructed PBB to credit Kear Seng's account with RM308,000. When Supermax discovered the fraud the following day it immediately notified the plaintiff which requested PBB to stop payment and refund the amount. PBB initially froze the sum but because there was no follow-up order from the court or the police to stop the sum from being withdrawn PBB had to oblige its withdrawal by Kear Seng. In the instant action, the plaintiff contended that the said sum was paid under a mistake of fact and the defendants were bound to return it under s 73 of the Contracts Act 1950. The plaintiff sought a declaration that the defendants were constructive trustees of the RM308,000 and were liable to pay the sum to the plaintiff. Alternatively, the said sum constituted monies had and received by the defendants to the plaintiff's use. The defendants, on the other hand, contended that they had given valuable consideration for the RM308,000 when they gave

Kueh USD100,000 and that they were not party or privy to the fraud committed. The defendants said the loss was entirely due to the plaintiff's negligence.

Held, allowing the claim with costs:

(1) The plaintiff had proved its claim on balance of probabilities against the defendants. The plaintiff was entitled to recover the RM308,000 as money had and received under s 73 of the Contracts Act 1950. The funds were transferred to Kear Seng's account by mistake and it would not be right in law for the defendants to retain and utilise the said sum (see para 28).

(2) It was settled law that in an action to recover monies paid under mistake the bank's negligence was irrelevant. In the instant case the plaintiff transferred the funds based on forged documents and under the mistaken belief that the authorisation letter and the manual payment form were signed by an authorised signatory of Supermax. This fact was not disputed by the defendants. The signature on those documents was not the signature of any of the authorised signatories. This fact also was not challenged by the defendants (see para 27).

(3) The defendants were unable to prove that D1 was, in fact, contacted by a person named 'John' and that a woman named Kueh Siok Hang actually came to his office to collect the USD100,000. D1 testified that Kear Seng had USD100,000 because of barter trading but he did not produce any evidence of such from the accounts of the firm. The defendants failed to prove that at the time 'John' called and enquired about the foreign exchange Kear Seng actually had USD100,000 in its possession (see paras 31–33).

(4) Even if Kear Seng did have the USD100,000, there was a failure to prove that the money was actually handed over to Kueh Siok Hang. No documentary evidence was produced to show that USD100,000 was in fact released to Kueh Siok Hang. No receipt was issued by D1 confirming the payment of that sum (see para 34).

[Bahasa Malaysia summary

Defendan pertama hingga defendan keempat ('defendan-defendan') menguruskan sebuah firma bernama Syarikat Kear Seng Trading ('Kear Seng') di Tawau, Sabah dan daripada premis perniagaan yang sama mereka juga menjalankan perniagaan pengurup wang bernama Insa. Kear Seng mempunyai akaun dengan defendan kelima bank ('PBB'). Menurut testimoni di dalam guaman, defendan pertama ('D1') menerima panggilan telefon daripada seorang lelaki bernama 'John' bertanyakan sama ada dia boleh mendapatkan USD120,000 dalam bentuk penukaran mata wang daripada Insa. D1 memberitahu 'John' bahawa Kear Seng mempunyai USD100,000 untuk

penukaran dan sekiranya 'John' sudi menerima dia hendaklah memasukkan jumlah setara sebanyak RM308,000 ke dalam akaun Kear Seng dengan PBB. Berikutan pembankan jumlah wang tersebut seorang wanita yang mendakwa bernama Kueh Siok Hang ('Kueh') datang ke premis Insa untuk memungut USD100,000. RM308,000 dimasukkan ke dalam akaun Kear Seng atas arahan plaintif selepas ia diminta untuk menyediakan kemudahan pemindahan jumlah tersebut oleh seorang bernama 'Ng' yang mendakwa dia mewakili salah seorang pelanggan korporat plaintif, Supermax. Ng telah mengemukakan surat kuasa wakil daripada Supermax, membenarkannya untuk berurusan dengan plaintif, dan perintah pembayaran manual yang dikatakan telah ditandatangani oleh penandatangan yang diberi kuasa oleh Supermax. Setelah mengesahkan tandatangan pada perintah pembayaran sepadan dengan rekodnya, plaintif mengarahkan PBB untuk mengkreditkan akaun Kear Seng dengan jumlah RM308,000. Apabila Supermax mengetahui tentang fraud keesokan harinya ia dengan segera memaklumkan plaintif untuk meminta PBB menghentikan pembayaran dan menebus semula jumlah tersebut. PBB pada awalnya membeku jumlah tersebut tetapi oleh kerana ketiadaan perintah susulan daripada mahkamah atau polis untuk menghentikan jumlah tersebut daripada dikeluarkan, PBB terpaksa membenarkan pengeluaran oleh Kear Seng. Dalam tindakan ini, plaintif berhujah bahawa jumlah tersebut telah dibayar di bawah kesilapan fakta dan defendan-defendan terikat untuk memulangkannya di bawah Akta Kontrak 1950. Plaintif memohon deklarasi bahawa defendan-defendan merupakan pemegang amanah konstruktif untuk RM308,000 dan adalah bertanggungjawab untuk membayar jumlah tersebut kepada plaintif. Secara alternatif, jumlah tersebut membentuk wang yang telah diterima oleh defendan-defendan untuk kegunaan plaintif. Defendan-defendan, sebaliknya, berhujah bahawa mereka telah memberikan balasan bernilai untuk RM308,000 apabila mereka telah memberikan Kueh USD100,000 dan bahawa mereka bukanlah pihak atau priviti kepada fraud yang dilakukan. Defendan-defendan berkata kerugian kesemuanya adalah disebabkan oleh kecuaian plaintif.

Diputuskan, membenarkan tuntutan dengan kos:

(1) Plaintif telah membuktikan tuntutannya atas imbangan kebarangkalian terhadap defendan-defendan. Plaintif berhak untuk mendapatkan semula RM308,000 sebagai wang yang dipunyai dan diterima di bawah s 73 Akta Kontrak 1950. Dana-dana dengan salah telah dipindahkan ke dalam akaun Kear Seng dan adalah tidak wajar dalam undang-undang bagi defendan-defendan untuk menyimpan dan menggunakan jumlah tersebut (lihat perenggan 28).

(2) Adalah undang-undang tetap bahawa kecuaian bank tidak relevan di dalam tindakan untuk mendapatkan semula wang yang dibayar atas dasar kesilapan. Dalam kes ini plaintif telah memindahkan dana-dana

berdasarkan dokumen-dokumen palsu dan dalam kepercayaan yang salah bahawa surat kuasa wakil dan borang pembayaran manual telah ditandatangani oleh penandatangan yang diberi kuasa oleh Supermax. Fakta ini tidak dipertikaikan oleh defendan-defendan. Tandatangan di atas dokumen-dokumen tersebut bukanlah tandatangan mana-mana penandatangan yang diberi kuasa. Fakta ini juga tidak dicabar oleh defendan-defendan (lihat perenggan 27).

(3) Defendan-defendan gagal untuk membuktikan bahawa D1 telah sebenarnya dihubungi oleh seorang bernama 'John' dan bahawa wanita bernama Kueh Siok Hang sebenarnya telah datang untuk memungut USD100,000. D1 menyatakan bahawa Kear Seng mempunyai USD100,000 disebabkan perdagangan dengan cara tukar-menukar tetapi dia tidak mengemukakan sebarang keterangan sedemikian daripada akaun-akaun firma. Defendan-defendan gagal untuk membuktikan bahawa semasa 'John' telah membuat panggilan dan bertanyakan tentang penukaran mata wang asing Kear Seng sebenarnya mempunyai USD100,000 di dalam pegangannya (lihat perenggan 31–33).

(4) Meskipun Kear Seng mempunyai USD100,000, terdapat kegagalan untuk membuktikan bahawa wang telah diberikan kepada Kueh Siok Hang. Tiada keterangan dokumentari telah dikemukakan untuk menunjukkan bahawa USD100,000 telah diberikan kepada Kueh Siok Hang. Tiada resit yang telah dikeluarkan oleh D1 untuk megesahkan pembayaran jumlah tersebut (lihat perenggan 38).]

Notes

For cases on mistake of fact, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5279–5289.

Cases referred to

Bank Bumiputra (M) Bhd v Hashbudin bin Hashim [1998] 3 MLJ 262; [1998] 2 CLJ Supp 332, HC (refd)

Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd and Another [1980] 1 QB 677, QBD (refd)

Kelly v Solan (1841) 9 M&W 54 (refd)

New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (in liquidation) [1987] 2 MLJ 57; [1986] 1 LNS 30, SC (refd)

Legislation referred to

Banking and Financial Institutions Act 1989
Contracts Act 1950 s 73

YB Tan (JC Yong with him) (Khaw & Partners) for the plaintiff/respondent.
TC Tan (Liew Hon Min & Co) for the first to fourth defendants.

Amirtha (Iza Ng Yeoh & Kit) for the fifth defendant.

Hasnah Hashim J:

[1] The plaintiff in this suit is claiming for amongst others the following relief:

(a) a declaration that:

(i) the defendants are constructive trustee for the said RM308,000 held in the Syarikat Kear Seng's account;

(ii) the plaintiff is the beneficiary of the said RM308,000 which is held in Syarikat Kear Seng's account; and

(iii) the defendants are liable to pay the said RM308,000 to the plaintiff as constructive trustee;

(b) in the alternative to sub-para (a) above, a declaration that the RM308,000 held in Syarikat Kear Seng's account as monies had and received by the first to fourth and/or fifth defendants to the plaintiff's use;

(c) an order that the first, second, third, fourth and/or fifth defendants do within seven days from the date of the order is made, pay to the plaintiff:

(i) the said RM308,000; and

(ii) interests on the said RM308,000 at the rate of 4.0%pa calculated from 19 September 2011 to the date of full and final payment thereof or at such rate and for such period as this honourable court deems fit and just;

(d) damages to be assessed;

(e) costs to be taxed by a proper officer of the court; and

(f) such further orders or relief as this honourable court deems just and fit.

BACKGROUND

[2] The plaintiff is a licensed bank under the Banking and Financial Institutions Act 1989. The first, second and third defendants are in a partnership operating under the name and style of Syarikat Kear Seng Trading (Kear Seng) with a place of business in Tawau, Sabah. Kear Seng is a customer of the fifth defendant and maintains an account bearing account No 3062600036 at the fifth defendant's branch in Tawau.

[3] Supermax Latex Products Sdn Bhd ('Supermax') is a customer of the

plaintiff and maintained a current account with the plaintiff. On 19 September 2011 the plaintiff received a letter of authorisation dated 19 September 2011 purportedly issued by Supermax authorising one Ng Kok Wee to represent Supermax for the transfer of the sum of RM308,000 to Kear Seng from Supermax. The said authorisation letter was accompanied with a manual payment order dated the same day for the said transfer and was purportedly signed by an authorised signatory of Supermax.

[4] Acting on the authorisation letter, the manual payment as well instructions by Ng Kok Wee the plaintiff transferred the sum of RM308,000 into Kear Seng's account via real time electronic transfer of funds and securities also known as RENTAS. On 20 September 2011 Supermax discovered that the sum of RM308,000 had been debited form Supermax's account and remitted to Tawau. Supermax immediately notified the plaintiff that they had not authorised the said transfer.

[5] By a letter dated 20 September 211 Supermax requested the plaintiff to credit back the sum transferred and at the same time lodged a police report as to the unauthorised transfer. Upon being notified of the unauthorised transfer the plaintiff immediately issued a RENTAS instruction to the fifth defendant for the refund of the said amount. The plaintiff also contacted the fifth defendant at the Tawau branch and was informed that the said sum would be frozen. The plaintiff lodged a police report on 23 September 2011 and by a letter through its solicitors requested the repayment of the said sum.

[6] By a letter dated 28 September 2011 the fifth defendant's solicitors informed the plaintiff that since a police report had been lodged the fifth defendant had taken steps to freeze the said amount in Kear Seng's account with the consent of Kear Seng pending police investigation.

[7] The plaintiff has credited the said amount into Supermax's account. By a letter dated 7 December 2011 the fifth defendant's solicitors informed the plaintiff's solicitors that Kear Seng wishes to withdraw the said amount and that the fifth defendant was constrained to oblige as there was no order from the court or the police restraining the withdrawal.

EVALUATION OF EVIDENCE

[8] The first and fourth defendants are brothers and operate a retail wholesale business in Tawau. They are also shareholders and directors of a company known as Insa Moneychanger Centre Sdn Bhd ('Insa') which is also operated at the same business premises in Tawau. Kear Seng and Insa are run and managed by the first to fourth defendants.

[9] PW1, Abimannan a/l Yaganathan, was the plaintiff's head of cash operations. He retired on June 2012 after serving the plaintiff since February 1995. As the head of cash operation he was required to oversee the various processing of payments conducted by the plaintiff.

[10] Through his witness statement he told the court that Supermax is an existing customer of the plaintiff with a current account bearing No 000001204289.

[11] PW1 told the court that upon receiving the manual payment order and upon checking the signatures the plaintiff had issued payment instructions to the fifth defendant for the transfer of funds into Kear Seng accounts on the same day. He also explained that they will compare the signatures against the signature specimen as per the plaintiff's records. Upon being satisfied that the signatures match then the sum will be released. As the sum was RM308,000 it did not require any call back confirmation.

[12] On 20 September 2011 the chief executive officer of the plaintiff was alerted by Dato Stanley Thai, the executive chairman cum Group Director of Supermax that the company had never instructed or authorised the individual, Ng Kok Wee to represent the company in the transfer of funds.

[13] By a letter dated 20 September 2011 Supermax confirmed that they never authorised the transfer of the funds neither do they know Kear Seng. PW1 further confirmed in evidence that the plaintiff had credited the sum of RM308,000 into Supermax's account. The said sum was credited after both the plaintiff and Supermax lodged the police reports.

[14] The plaintiff issued a recall RENTAS CLN instruction for the refund of the funds transferred. The fifth defendant informed the plaintiff that Kear Seng's account will be frozen pending the police investigation and the disposal of the suit.

[15] Alban Lee Sin Tet ('PW2') is the legal Affairs Manager of Supermax. He confirmed in evidence that Supermax did not authorised the transfer and that Supermax does not have any dealings in Sabah. DW1, Sin Huan Kwang the second defendant, told the court that his company does a lot of barter trading of sundry retails with traders form Philippines and Indonesia. He confirmed that both Kear Seng and Insa share a common address that is TB18, Jalan Dunlop Tawau, Sabah.

[16] According to DW1 sometime in September 2011 he received a telephone call from someone asking whether Insa had a substantial sum of US dollars for exchange as the person told DW1 that he would like to have

USD120,000. Kear Seng had about USD100,000 at hand at that time and therefore was able to provide the US dollars requested by this person:

> I remembered that I told the caller we had approximately USD100,000.00 for exchange. I also told him what time he would like to exchange the currency, thinking that he was a customer in Tawau who would just drop in to our shop This caller told me his company in Kuala Lumpur named 'Supermax' would first deposit into our bank account. He also identified himself as 'John' and said he would contact me again.

[17] Subsequently DW1 gave 'John' Kear Seng's bank account number and told him to bank the sum of RM308,000. After the money was deposited a Chinese woman by the name of Kueh Siok Hang came to Insa's premises and collected the sum of USD100,000. She said she was Supermax's staff.

[18] Based on both the oral and documentary evidence that the plaintiff had transferred the sum of RM308,000 to Kear Seng by mistake. The transfer was based on forged documents ie authorisation letter and manual payment form. This fact was not disputed by the defendants. PW1 explained in evidence that they checked the specimen signatures and upon being satisfied they proceeded with the transfer. The moment they realised and were told of the unauthorised transfer efforts were made to check with the fifth defendant and to refund the said amount.

[19] The defendants (the first defendant to fourth defendant) explained through DW1 that the RM308,000 was in exchange of USD100,000. According to DW1 since the first to fourth defendants had USD100,000 he agreed to the exchange transaction. DW1 agreed to proceed and gave 'John' Kear Seng's account number in the fifth defendant. Subsequently on 20 September 2012 DW1 gave the USD100,000 to another person by the name, Kueh Siok Hang, purportedly to be Supermax's representative.

[20] The fifth defendant did informed DW1 that the funds remitted were dubious and pending police investigation. However the first and fourth defendants submitted that they have given valuable consideration for the said RM308,000 and were neither a party or privy to the fraud committed. Therefore the loss is entirely that of the plaintiff's negligence.

[21] The plaintiff relied on s 73 of the Contracts Act 1950 that monies paid under a mistake of fact must repay or return those monies. Section 73 of the said Act 1950 reads as follow:

> A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

[22] It is submitted by learned counsel for the plaintiff that where money is paid under the influence of a mistake of fact an action will lie to recover it back and it is against conscience to retain. Negligence on the part of the paying party will not preclude recovery as long as the payment was made under the impression of the truth of a fact which is untrue.

[23] In the instant case the plaintiff made the payment upon the honest assumption that it was a genuine request of an authorised transfer from Supermax to Kear Seng. This was obviously a mistake Supermax did not authorised such a transfer to a company which they do not have any business dealings. Aside from that, being forged the manual payment order the lack of authorisation is proved. Therefore where the existence of a mistake has been proved, it is contended that the defendants must comply and return the monies.

[24] Learned counsel referred to the case of *Kelly v Solan* (1841) 9 M&W 54 where Parke B said:

> I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it: … If indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact ….

[25] Parke B's was cited with approval by Goff J in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd and Another* [1980] 1 QB 677 at p 687, that if money was paid under a mistake, it would be against good conscience to retain that money. Where there was no intention that the money should be retained once the truth is known regardless of there being want of due diligence, the money also must be returned.

[26] In *Bank Bumiputra (M) Bhd v Hashbudin bin Hashim* [1998] 3 MLJ 262; [1998] 2 CLJ Supp 332, Nik Hashim J (as His Lordship then was) was of a similar view and he said that:

> … neither the knowledge by the bank of the insufficient funds in PW4's account to cover the cheque nor the mistake due to the negligence of the bank in paying the cheque is a bar to the bank's claim under s 73 and under the common law on 'money had and received … It is settled law that in an action for the recovery of money paid under mistake, the bank's negligence is irrelevant. In the particular circumstances of this case, it is not right for the respondent to keep the money. He is bound by the ties

of natural justice and equity to refund the money to the bank. There is no evidence to show that the respondent has altered his position in a manner rendering it inequitable that he should repay the money.

[27] It is settled law that in an action for the recovery of money paid under mistake the bank's negligence is irrelevant. In the instant case the funds were transferred from the plaintiff to the first defendant based on forged documents. The plaintiff had paid the said sum to Kear Seng by mistake as it was under the mistaken belief that the authorisation letter as well as the manual payment form was by an authorised signatory of Supermax. This fact is not disputed by the defendants. The purported authorised signature was not the signature of any of the authorised signatories as confirmed by PW2 in evidence. This was never challenged by the defendants.

[28] I have carefully scrutinised the facts, both oral and documentary evidence and considered the submissions of the counsels. Upon so doing I am of the considered view that the funds were transferred to Kear Seng accounts by mistake and in the circumstances it would not be right in law for the first defendant to retain and utilise the said funds.

[29] I agreed with learned counsel for the plaintiff that the plaintiff is entitled to recover the sum transferred as money had and received under s 73 of the Contracts Act 1950.

[30] In *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (in liquidation)* [1987] 2 MLJ 57; [1986] 1 LNS 30, Gunn Chit Tuan J (as His Lordship then was) said:

> Next, on money had and received, counsel referred to the views of Lord Haldane LC speaking for the judicial committee in *Royal Bank of Scotland v Rex* when he said:
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> It is a well-established principle of the English common law that when money had been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as money had and received to his use.

[31] It is the Kear Seng's defence that they had given valuable consideration for the said RM308,000 when it gave one Kueh Siok Hang USD100,000. However, the defendants (the first to fourth) could not provide any evidentiary proof that DW1 had in fact been contacted by the individual by 'John' and a women by the name of Kueh Siok Hang actually came to his office to collect the money.

[32] DW1 in his evidence explained that he had the UDSD100,000 because of the barter trading but did not produced any evidence such the accounts of

A the company. When DW1 was further cross-examined he said that Kear Seng had in fact been holding the sum of USD100,000 since June 2012 that is 2–3 months before the transfer.

[33] Furthermore the first, second, third and fourth defendants have failed B to prove that on 12 September 2011 when 'John' called and enquired as to the foreign exchange the Kear Seng had the sum of USD100,000 in its possession. DW1 in evidence said that he had received verbal confirmation from one Amy Lim, from the fifth defendant's Tawau branch that the funds have been credited into the first defendant's account. DW1 should have confirmed with the fifth defendant branch manager before releasing the said USD100,000. DW2, the C bank officer of the fifth defendant gave evidence that she was not aware when the said sum was deposited because the funds were credited through PBB Centre and not the PBB Tawau branch. Amy Lim was not called by the first to fourth defendants to confirm the teleconversation with DW1.

D **[34]** Even if Kear Seng had the said USD100,000 Kear Seng failed to prove that the money was actually handed over to Kueh Siok Heng. No documentary evidence was adduced to show that the sum of USD100,000 was in actual fact released to Kueh Siok Hang. No receipt was issued by DW1 confirming the transaction and the payment of the USD100,000.

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[35] Therefore after evaluating and deliberating on all the evidence led, the oral and documentary evidence as well considering the written submissions of counsels and the aforementioned reasons I am satisfied that the plaintiff has proved its claim on the balance of probabilities against the defendants. F Accordingly I allow the plaintiff's claim as follows:

(a) a declaration that the RM308,000 held in Syarikat Kear Seng's account as monies had and received by the first to fourth defendants to the plaintiff's use;

G (b) an order that the first, second, third, fourth and fifth defendants do within seven days from the date of the order is made, pay to the plaintiff:

(i) the said RM308,000;

(ii) interests on the said RM308,000 at the rate of 4.0%pa calculated from date of this order and until realisation; and H

(iii) cost of RM30,000 to be paid by the first, second, third and fourth defendants.

Claim allowed with costs.

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Reported by Ashok Kumar